United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
MARGERY EVANS REIFLER

74-1485

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA ex rel.
LARRY DAVID HAYDEN,

Petitioner-Appellant,

-against-

JOHN R. ZELKER, Warden of Green Haven
State Correctional Facility, Stormville,
New York,

Respondent-Appellee.

----------X

[APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7590

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Deputy Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY DAVID HAYDEN,	:	
Petitioner-Appellant,	:	Docket No. 74-1485
-against-	:	
JOHN R. ZELKER, Warden of Green Haven State Correctional Facility, Stormville, New York,	:	
Respondent-Appellee.	:	

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

1. Is a petitioner who committed an offense prior to the effective date of a revised penal law entitled to the benefits of the revised law's sentencing provisions, when that law specifically bars its application to those who committed offenses prior to its effective date?

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Constantino, J.), dated April 19, 1973, which denied petitioner's application for a writ of habeas corpus.

Petitioner claims that he is being denied equal protection of the law because his class, those who committed the crime of carnal abuse before the effective date of the new Penal Law, received different sentences from those who committed the offense after such date. The revised Penal Law contained a specific savings clause which preserved prior construction and sentencing for offenses committed prior to its effective date. The District Court held that the State indubitably has the power to make statutory changes applicable to future conduct only and denied the application.

Facts

Petitioner is presently confined at the Adirondack Correctional Treatment and Evaluation Center in Dannemora, New York,* pursuant to a judgment of conviction for the crimes of carnal abuse of a child and endangering the life or health of a child. Judgment was rendered by the County Court, Suffolk County, after a trial by jury. On November 20, 1964 the Court (Stark, J.) sentenced petitioner to an indeterminate term of one day to life on the carnal abuse count and to time served in the County Jail on the endangering count.

*At the time that the petition was instituted, petitioner was confined at Green Haven Correctional Facility, Stormville, New York. He was transferred to the Adirondack Center on February 17, 1974.

Petitioner's indeterminate sentence was authorized by former Penal Law § 483-a (McKinney's Supp. 1966), to be read in conjunction with former Penal Law § 2189-a (McKinney's Supp. 1965). In 1968 the New York Court of Appeals held that its statutory scheme for indeterminate sentencing did not meet the requirement of Specht v. Patterson, 386 U.S. 605 (1967), that a defendant receive a presentence hearing on the factual issues which would sustain the imposition of an indeterminate sentence, independent of the issue of guilt. Accordingly, the Court ordered that those who were sentenced under the indeterminate statute be afforded the required hearing and resentencing. People v. Bailey, 21 N Y 2d 588 (1968).

Petitioner then filed an application for a writ of error coram nobis, seeking to be resentenced. After the requisite examinations, reports, and a hearing, the Court granted the writ to the extent that the prior sentence was vacated and a new sentence of one day to life was imposed on December 27, 1968, nunc pro tunc as of November 20, 1964. After reviewing the evidence the Court noted that petitioner had been found to be "a good candidate for long-term reconstructive type of therapy" and concluded that he was "capable of being benefitted by con-

finement under an indeterminate sentence." The Court further found that there existed a risk and danger to the community if petitioner were to be released at that time.* These findings met the requirement for the imposition of an indeterminate sentence. People v. Bailey, supra; People v. Jackson, 20 A D 2d 170 (3d Dept. 1963). Petitioner's appeal from his resentencing was unsuccessful. People v. Hayden, 33 A D 2d 656 (2d Dept. 1969), leave to appeal to the Court of Appeals denied (Scileppi, J.), November 25, 1969.

Petitioner then filed a coram nobis petition which raised essentially the same issues presented herein. His application was denied by the County Court, Suffolk County (Lipetz, J.) on January 31, 1972. People v. Hayden, 68 Misc. 2d 1022. Leave to appeal to the Appellate Division was denied on November 25, 1969 (Shapiro, J.). These proceedings satisfied the exhaustion requirement of 28 U.S.C. § 2254.

Petitioner has met the Parole Board on six occasions since his conviction (April 8, 1965; April 6, 1967; April 16, 1969; April 27, 1971; October 18, 1972; April 16, 1974) and is scheduled to be brought before the Board again in June of 1975.

*The minutes of the resentencing were not before the District Court. Respondent's counsel is attempting to obtain a complete copy and will submit them to this Court as an exhibit as soon as possible. The above extracts are taken from the State's brief on petitioner's direct appeal.

Argument

WHEN A REVISED PENAL LAW SPECIFICALLY BARS ITS APPLICATION TO THOSE WHO COMMITTED OFFENSES PRIOR TO ITS EFFECTIVE DATE, A PETITIONER WHO COMMITTED AN OFFENSE PRIOR TO THAT DATE IS NOT ENTITLED TO THE BENEFITS OF THE SENTENCING PROVISIONS OF THE REVISED LAW.

Petitioner was convicted for the crime of carnal abuse under the former Penal Law § 483-a (McKinney's Supp. 1966). According to the terms of that section, he could have been sentenced to a term of up to ten years or to an indeterminate term of one day to life. The indeterminate term was authorized in cases in which there was a finding that the person was a danger to society or was capable of being benefitted by the treatment afforded by the indeterminate statutory scheme.* People v. Bailey, supra; People v. Jackson, supra. Petitioner received the indeterminate term upon sentencing in 1964 and again upon his resentencing in 1968 nunc pro tunc, when he was afforded certain new procedural safeguards under People v. Bailey, supra.

*The statutory scheme is set forth in full in L. 1950, ch. 525, "An act to amend the mental hygiene law, the correction law, the penal law and the code of criminal procedure, in relation to the sentence, study, diagnosis and treatment of persons convicted of certain crimes." Although certain of the provisions of the act have since been amended or repealed, the essential scheme remains the same.

In 1967 New York State revised its Penal Law. The crime of carnal abuse became sexual abuse in the first degree (§ 130.65[3]).* The maximum punishment for the crime was changed to a term of up to seven years (§ 70.00[2][d]). The new Penal Law also contained a specific savings clause (§ 5.05[3]) which preserved the punishment of the former Penal Law for offenses committed before the effective date of the new Penal Law.

It is petitioner's contention that the existence of different sentencing schemes which are applied according to the time when the offense was committed is a form of irrational discrimination. He suggests that such sentencing discrimination between those who committed the crime before the effective date of the new Penal Law and those who committed the offense after that date is violative of the Equal Protection Clause of the

* The decision denying petitioner's coram nobis application suggested that the two crimes were not analogous because the element of lack of consent is required to prove the crime of sexual abuse (Penal Law § 130.05[1]; § 130.65) and was not required to prove carnal abuse under former Penal Law § 483-a. People v. Hayden, 68 Misc. 1022, 1025 (Co. Ct. Suffolk Co. 1972). Since lack of consent is deemed proved if the victim is under the age of seventeen (Penal Law § 130.05[3][a]), as is the case here, respondent suggests that the two crimes are indeed analogous. See also Penal Law § 15.20(3); Denzer v. McQuillan, Practice Commentary, McKinney's Penal Law, Vol. 39 at 307-308, 310-11; Derivation Table, McKinney's Penal Law, Vol. 39 at XLI.

United States Constitution. Petitioner accordingly seeks to benefit from the sentencing provisions of the revised Penal Law and states that he would already have been released had such new provisions been applied to him.

Petitioner's contention must fail for the simple reason that a legislature has the power to change the sentencing scheme for a crime without making such change retroactive. E.g. Warden v. Marrero, ____ U.S. ____, 42 U.S.L.W. 4955 (June 18, 1974); Bradley v. United States, 410 U.S. 605 (1973). The rule has applied to such sentencing changes whether made by state legislatures, Holscher v. Young, 440 F. 2d 1283, 1290 (8th Cir. 1971); United States ex rel. Cooper v. Zelker, 339 F. Supp. 410 (S.D.N.Y. 1972)(Weinfeld, J.), or Congress. E.g. United States v. Ross, 464 F. 2d 376 (2d Cir. 1972), cert. den. sub nom. Ross v. United States, 410 U.S. 990, reh. den. 411 U.S. 977 (1973); United States v. Fiotto, 454 F. 2d 252, 254-55 (2d Cir.), cert. den. sub nom. Fiotto v. United States, 406 U.S. 918 (1972); United States v. Kirby, 176 F. 2d 101, 104 (2d Cir. 1949). See United States v. Fiore, 467 F. 2d 86, 88 (2d Cir. 1972) cert. den. sub nom. Fiore v. United States, 410 U.S. 984 (1973).

Indeed, none of the cases espousing this principle has even questioned the power of a legislature to change its sentencing schemes for a particular crime without making such changes retroactive. Rather, the cases have looked to legislative language and history to determine what was intended by the repeal of the previous statutory scheme. A new, repealing statute will not operate to abate a prosecution (including sentencing) under the repealed statute if there is legislative intent demonstrated otherwise. See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 432-33 (1972). Such intent may be found in a specific savings clause in the new or repealing statute (e.g. Holscher v. Young, supra at 1290); in a general savings clause (e.g. Pipefitters Local, supra at 433-435); Ex Parte Lamar, 274 Fed. Rep. 160, 172 (2d Cir. 1921), affd. sub nom. Lamar v. United States, 260 U.S. 711 (1923); or in a combination of the two (e.g. Warden v. Merrero, supra; United States v. Ross, supra at 379).

Under New York law both general and specific savings clauses uphold petitioner's sentence and resentence under the Penal Law in effect when his offense was committed. Section 5.05(3) of the revised Penal Law of 1967 states:

"§5.05 Application of chapter to offense committed before and after enactment

* * *

(3) The provisions of this chapter do not apply to or govern the construction of and punishment for any offense committed prior to the effective date of this chapter ... Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this chapter had not been enacted."*

There could not be a clearer manifestation of the legislature's intent. A defendant who committed an offense prior to September 1, 1967 and was sentenced or resentenced after that date is to be sentenced under the former Penal Law. United States ex rel. Cooper v. Zelker, supra at 413.

*Petitioner's suggestion that § 5.05(3) is inapplicable to him since he is not being "punished" but either treated or preventively detained is frivolous. An analogous argument was made in United States v. Brown, 381 U.S. 437 (1965), in which the Government argued that a statute did not impose punishment because it was enacted for preventive rather than retributive reasons. Id. at 456-57. The argument was flatly rejected since such a definition would be "archaic"; punishment serves several purposes -- retributive, rehabilatative, preventive, and deterrent -- but it is nonetheless punishment no matter what the purpose. Id. at 458. Cf: United States v. Schipani, 315 F. Supp. 253, 255 (E.D.N.Y.), affd. 435 F. 2d 26 (2d Cir. 1970), cert. den. sub nom. Schipani v. United States, 401 U.S. 983 (1971).

Section § 5.05(3) of the new Penal Law replaced § 39 of the former Penal Law. Section 39 allowed a defendant who committed his offense prior to the effective date of the former Penal Law the benefit of a newly enacted lesser penalty, if sentence or judgment was imposed after its effective date. This portion of the savings clause was not preserved in the 1967 Penal Law revision and is a further demonstration that the Legislature did not intend the 1967 sentencing provisions to apply to anyone who committed his offense prior to 1967. This is, indeed, exactly how the New York courts have interpreted the law. E.g. People v. Pepples, 27 N Y 2d 785 (1970); People v. Dozois, 26 N Y 2d 637 (1970).

Moreover, New York has a general savings clause (similar to the federal savings clause, 1 U.S.C. § 109) which would compel the same result. Section 93 of the General Construction Law states:

> "§ 93 Effect of repealing statute upon existing rights.
>
> The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected."

Petitioner suggests, however, that a non-retroactive, mitigating change in a penal law must be justified on some rational basis, to withstand the test of the Equal Protection Clause.* Respondent submits that such justification is not necessary. The right of a legislature to make a penal law applicable to future conduct only is unquestioned. Once it is demonstrated that the new penal provision is not intended to be retroactive, the claim of a prisoner sentenced under the old law is defeated. The courts have not called on the state or federal governments to justify the non-retroactivity of the new, less harsh sentencing scheme. This has been so in each of the cases cited herein and petitioner has cited no case to the contrary.

For example, in Bradley v. United States, supra, the petitioners claimed entitlement to the sentencing provisions of a law which became effective after the date they committed the conspiracy of which they were convicted. The new law allowed probation, parole, and suspended sentences for that crime, none of which were available under the repealed statute. The Court

*Petitioner suggests elsewhere that the correct test is a compelling state interest since lengthier confinement infringes on personal liberty, a fundamental right, citing Bolling v. Manson, 345 F. Supp. 48, 51 (D. Conn. 1972). This proposition was impliedly rejected by the United States Supreme Court in McGinnis v. Royster, 410 U.S. 263, 276, 273 (1973) when the rational relation test was used to judge a state statute which subjected certain inmates to longer punishment than others. See also Sero v. Oswald, 351 F. Supp. 522, 527 n. 6 (S.D.N.Y. 1972).

held that the savings clause of the new statute clearly prevented the application of its provisions to prosecutions (including sentencing) for violations which occurred before its effective date. Congressional intention to bar retroactivity was clear; the Government was not required to provide a rational basis for making the new, less harsh sentencing provisions applicable only to those who committed the offense after the effective date of the new law. See also Warden v. Marrero, supra and other cases cited herein.

In any event, New York's decision to make its sentencing provisions for sex offenders prospective only can be justified on a rational basis, since it is part of a continuing effort in the area of penal reform. The indeterminate scheme under which petitioner was sentenced was part of an experimental program for the treatment of sex offenders. L. 1950, ch. 525 "An act to amend ... in relation to the sentence, study, diagnosis and treatment of persons convicted of certain crimes;" People v. Bailey, supra; People v. Jackson, supra. An examination of that law reveals that the provision for indeterminate sentencing was but part of a broadbased and undoubtedly expensive plan for psychiatric and psychological services, treatment and diagnostic clinics, regular reporting, etc. The

law required the expenditure of funds for both the Departments of Mental Hygiene and Corrections. Its content as well as the Governor's reports reveal its experimental and innovative nature. Governor's Message to the Legislature, Sex Crime, 1950 New York State Legislative Annual 334-36; Governor's Memoranda on Approved Bills, Sex Offenders, 1950 New York State Legislative Annual 353-54.

In 1967 the Legislature decided to abandon indeterminate sentences for sex offenders. This was not necessarily an admission that the scheme was unsuccessful or the policy reasons behind it unjust, as petitioner suggests. The Legislature could have decided only that it no longer wished to expend its funds in the area of treatment and detention costs for sex offenders but rather in other areas. It is well-established that a statutory scheme will not be set aside if any state of facts reasonably may be conceived to justify it. E.g. Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

Equal protection does not mandate absolute equality or precisely equal advantages, but only that distinctions drawn be rationally related to a legitimate state purpose. E.g. San Antonio School District v. Rodriguez, 411 U.S. 1, 42, 55 (1973);

Dandridge v. Williams, supra at 485. There is no disputing the fact that penal reform is a legitimate state interest. New York's innovative treatment program for sex offenders is rationally related to the end of penal reform. The decision to forego such a program, even for monetary reasons, is also rationally related to that end, since by definition penal reform is experimental in nature and entails attempts, discarding, new attempts.* Likewise, it entails changing decisions concerning the expenditure of funds. The decision to abandon indeterminate sentencing for sex offenders is part of experimentation which is rationally related to the legitimate end of penal reform.

Since experimentation rationally furthers the end of penal reform, a legitimate state interest, the Courts will not deal with the wisdom of the policy adopted or the adequacy of the law enacted to further the policy. E.g. San Antonio, supra at 55; Nebbia v. New York, 291 U.S. 502, 537 (1934).

Finally, petitioner raises the issue of his alleged ineligibility for parole. This issue was never raised in the

*Penal reform, like education and welfare, presents a "myriad of economic, social and even philosophical problems." See San Antonio, supra at 42; Dandridge v. Williams, supra at 487.

state courts or the District Court and is not properly before this Court. E.g. United States ex rel. Springle v. Follette, 435 F. 2d 1380 (2d Cir. 1970), cert. den. 401 U.S. 980 (1971); United States ex rel. Ross v. LaVallee, 341 F. 2d 823, 824 n. 1 (2d Cir.), cert. den. 382 U.S. 867 (1965). This Court has stated that on appeal it is confined "to a review of the petition which appellant filed below." United States ex rel. Krzywosz v. Wilkins, 336 F. 2d 509, 511-12 (2d Cir. 1964).

In any event, this is a non-issue since petitioner is eligible for parole and has met the Board of Parole six times.* According to §§ 212 and 214(3) of the New York Correction Law, petitioner's eligibility for parole is established.** The law required that petitioner be brought before the Board of Parole within six months of his conviction and at least once every two years thereafter. N.Y. Corr. Law § 214(3). The Board has before it the original as well as recent reports on petitioner's

* Supra at 4 . Since this issue was not before the District Court there is no evidence in the record regarding petitioner's meetings with the Board. The information provided herein was obtained from petitioner's Senior Parole Officer at the Adirondack Center and checked with the Department of Correctional Services in Albany. If the Court so requests, respondent is willing to provide further documentation or testimony as to these facts.

** Section 212 was repealed and replaced since petitioner's conviction but still applies to those convicted of an offense committed before September 1, 1967. L. 1970, c. 476, § 42.

mental, physical and psychiatric condition, Corr. Law § 214(3); Executive Order No. 5 (1960), 9 NYCRR § 1.5, as well as other information. Corr. Law § 214(4)(McKinney's Supp. 1973). Moreover, petitioner, if paroled, is not necessarily on parole for life. According to Corr. Law § 220(3), a parolee sentenced to an indeterminate term of one day to life term may be conditionally or absolutely discharged from parole before the expiration of his full maximum term.*

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
July 1, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Deputy Assistant Attorney General
of Counsel

*This provision has been repealed since petitioner's conviction but is still applicable to those convicted of an offense committed before September 1, 1967. L. 1970, ch. 476, § 44.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 1st day of July, 1974, she served the annexed upon the following named person:

Michael Rauch, Esq.
Attorney for Petitioner-Appellant
Fried, Frank, Harris, Shriver
& Jacobson
120 Broadway
New York, N.Y. 10005

Attorney in the within entitled proceeding by depositing 2 copies a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Angela Fiore

Sworn to before me this
1st day of July, 1974

Deputy Margery Evans Reiffler
Assistant Attorney General
of the State of New York